STATE OF ALASKA

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November 21, 2000

Kevin Keeler
Rivers, Trails and Conservation Assistance Program
National Park Service
2525 Gambell Street, Suite 107
Anchorage, AK 99503-2892

Dear Mr. Keeler:

The State of Alaska has reviewed the draft document Legal Public Access to Alaska's Recreation Trails, a Citizen's "how-to" Handbook, dated May 2000, prepared by the National Park Service Rivers, Trails, and Conservation Assistance Program. This letter represents the consolidated comments of the state's resource agencies.

We recognize the tremendous amount of time and effort that the Service has invested in assembling this booklet, and appreciate the extended opportunity to review this draft. The goal of a single Handbook covering this scope is both ambitious and admirable. We also appreciate the efforts to make the document engaging and easy to understand. We wholeheartedly support the intent of this project and wish to see a successful document.

Substantial revision is needed, however, to meet this objective. We are particularly concerned with the many factual errors, overgeneralizations, and incomplete explanations of law. We are also concerned that certain disputed information and interpretations of law are sometimes hidden from view. In such cases, the Handbook should note the differences so that the public isn't mislead by omission. Ignoring such key disputes does not serve the public interest.

The draft Handbook also under-estimates the complexity and difficulty of reserving legal trail access. In attempting to accommodate a general audience, the draft either omits or states incorrectly important technical substance. Ideally, the final Handbook should be a definitive exploration of a highly technical set of issues. We recognize, however, that "*definitive*" will require some limitations; so in cases where it is not possible to include all details, the Handbook should more regularly direct the reader to other sources of further information.

The draft Handbook also inappropriately chides public agencies for alleged inaction without sufficient recognition that lack of funding and other constraints are often key underlying issues. To address this latter concern, the recommendations should note that the public can lobby for the necessary funding and priority setting to assist agencies in identifying, establishing and managing trail access. Finally, the draft Handbook periodically steers into soap box mode during presentation of what should be factual, technical information.

Unfortunately, the state's access issue technicians were not provided an opportunity to review this document before it was widely distributed to the public, albeit in draft form. Hence the public is now in possession of substantially inaccurate information, that, without correction, will put a further drain on agencies charged with asserting, protecting, and managing trails. Given the level of improvement that is required in this document, we urge:

- the next revision should be prepared as an agency review draft that is extensively reviewed by a variety of state and federal personnel with access expertise;
- once it has been fully reviewed and corrected, the final draft document should be more widely distributed and publicized than this draft;
- where there are substantive differences in interpretation of laws, the differences should be acknowledged and/or explained, including citing any applicable court cases; and
- policy recommendations and other editorializing should be consolidated in one place, not woven into the technical sections.

Our detailed comments are attached, organized by chapters. Even though state agencies invested considerable staff time in this review, we cannot guarantee that we picked up everything that may need correction or further clarification. We are prepared, however, to work with you on future revisions to make this the useful reference document that the public and agencies will value.

Thank you again for the opportunity to review this draft Handbook.

Sincerely,

// ss //

Sally Gibert
State CSU Coordinator

cc: Pat Galvin, Director, Division of Governmental Coordination
Pat Pourchot, Commissioner, Department of Natural Resources
Frank Rue, Commissioner, Department of Fish and Game
Joseph Perkins, Commissioner, Department of Transportation and Public Facilities
Michele Brown, Commissioner, Department of Environmental Conservation
Deborah Sedwick, Commissioner, Dept of Commerce and Economic Development

Note: In the remainder of our comments, italics are used for material quoted from the document, boldface is used to flag Handbook page locations, and underlining is used for emphasis.

INTRODUCTION

✓ Avoid generalizations**.** We strongly recommend the final document be revised to present facts and clearly articulated statements, and acknowledge where there are differing interpretations in the application of statutes, regulations and policies. This comment applies throughout the document.

✓ Avoid the arbitrary categorization of trails as "*formal*", "*informal*", and "*unofficial*" since they are not reflective of legal status (**page iii**). Specifically, the summary discussion is not clear about legal easements versus those trails of unknown status. This is also evident from the inconsistent use of the term "*unofficial*" in the remainder of the Handbook.

We recommend you consider organizing the Introductory sections and the Handbook itself by the type of trail, including an explanation of legal parameters, definitions, responsible agencies, and the process for verification or assertion. A summary could provide a simple listing of access types, such as:

1. Routes or easements that legally exist but may not be developed, marked or locatable in the field, such as many ANCSA 17(b) easements, RS 2477 rights-of-way, section-line easements, national historic trails, Alaska National Interest Lands Conservation Act (ANILCA) Title VIII and XI access, and
2. trails that exist on the ground but may not have any legally protected status, or those where the legal status is unclear under either federal or state law, thus requiring legal research and/or action to assert them.

Alternatively, the Handbook could be organized around the types of access, distinguished by legal origin regardless of whether they actually exist:

1. federally established trails managed by federal agencies, e.g., 17(b) easements, ATV trails on conservation system units (CSUs);
2. statutorily created trails managed by the state (e.g., RS 2477s and section-line easements) or municipal authorities (cities and boroughs); and
3. mixed ownership/management trails (e.g., national historic designated trails such as the Iditarod).

The categories presented in the draft Handbook are misleading. The proposed category of a "*formal trail*" is defined as one that is "*important or significant (for current uses or future needs)*" and contends, "*almost all formal trails are found on public lands.*" This is inaccurate. For example, ANCSA 17(b) easements are established by BLM to cross private lands to provide public access between public lands and waters that would otherwise be isolated. Such easements are not on public land but are important to adjacent villages and to members of the public for access across private lands to conduct activities on public lands and waters. They may not

presently exist or be identifiable on the ground but, as a category, will grow increasingly important as land conveyances are completed. As another example, section-line easements occur across both private and public lands, are important for a range of future access and utility needs, and may not be noted on any maps or public documents.

The use of the terms "*trail*" and "*easement*" are often used interchangeably, which can also lead to confusion. (In fact, in putting together this letter we found ourselves having the same difficulty.) As a general principle, an easement is not a trail and a trail is not an easement (and there's no guarantee of good public access unless the trail is either on an easement, or on public land!)

Introduction: Page Specific Comments

Page i, line 31: Delete the word "*hopefully*."

Page i, paragraph 6, 2nd sentence: This is too big an assumption. It is, perhaps, better characterized as an ideal goal.

Page 1.1, line 40: Close paragraph with "*Maintaining legal access to trails is essential in order to sustain the long term economic benefits that derive from trails*."

Page 1.4, line 10: Close paragraph with "*Trail recreation is one of the most important components of Alaska's highly prized adventure travel and ecotourism opportunities. These are among the fastest growing sectors in tourism today*."

CHAPTER 1. WHY ESTABLISH LEGAL PUBLIC ACCESS?

✓ Reduce the implication that the public is responsible for "*establishing legal public trails*." By the same token, the public can play an important supporting role in achieving positive results. The very first paragraph makes reference to "*unofficial or not-legally established trails,"* reflecting an inappropriate bias in the Handbook concerning what may, indeed, be legal trails that the responsible agencies simply have not documented or managed. The chapter fails to answer the more substantive question: "How can legal public access be more effectively asserted and managed?" The acquisition of information from the public on historic trail use and current need is certainly an important component.

Page 1.1

- The second sentence of the first paragraph is unsubstantiated. The second sentence of the second paragraph is also unnecessary. A more substantive introduction could combine the first sentence of each of the first two paragraphs and add an explanation of the very limited amount of developed transportation infrastructure that exists in Alaska considering the size and geography of the state. The information on numbers of trail users cited on pages 1.3 and 1.4 could be moved to this location as data to support estimates of current uses.

- Combine paragraph 3 with the last sentence of paragraph 4, deleting the remainder of paragraph 4. There is no justification for using the estimate of recreational dollars annually spent by Anchorage cross-country skiers and snowmachiners to generate an estimate of annual statewide expenditures. One-half of Alaska's population may be in Anchorage, but the remainder of the state is too economically diverse to assume the same dollars per capita would be spent on recreation. Also, the lack of infrastructure and differences in transportation needs in rural Alaska demonstrate an additional dependence on trails for access within and between communities, not just for recreation.

- Paragraph 5. Who assumed these trails "*are often taken for granted*"? Change "*often*" to "*sometimes*." State agencies regularly receive calls from residents who are concerned about some aspect of trail or other access rights, particularly from trappers, hunters, fishermen, and outlying community residents. Also, the risk of losing these trails is not necessarily from "*a lack of clear process*" as stated in the second sentence. The legal process to acquire an easement from a landowner usually involves contacting the respective landowner, applying for, negotiating with, and receiving an easement from the landowner. The legal process is "*clear*", that is, <u>legally</u> an easement is created or not. However, while the legal process may be clear the adjudication or negotiation process is sometimes neither simple nor straightforward. Often it is complex. Therefore the Handbook should place more emphasis on the slightly different adjudication process required by each responsible agency. This might be a topic for an entirely separate chapter. The public's use of legal trails is also substantially affected by "*a lack of…*":
    1. sufficient funding and personnel in the public agencies to research, assert, survey, record, maintain, educate, and enforce,
    2. public agencies' policies concerning assertion and defense of legal trails, and
    3. private landowners' knowledge and acceptance of legal trails and accurate information about public access rights.

Page 1.2-1.3, "Land Ownership and Use is Changing"

- The land status map is not very helpful due to its scale and inaccurate caption. For example, in Southcentral Alaska, most roadside land is <u>not</u> state owned. Sources for accurate land status information on the web and locations at state and federal agencies should be provided.

- **Page 1.2** – last paragraph, 1st sentence: "*Land ownership in Alaska is . . . highly intricate*." Delete "*highly intricate*." Compared to most places in the United States, Alaska's land ownership is not intricate. The federal and state governments own vast acreage. This paragraph should note that, once the land ownership transfers are completed, over 60% of Alaska will remain federal public lands. On the other hand, we agree that land ownership in Alaska is dynamic, due to ongoing small and large scale land transfers.

- The last paragraph of this section (starting on line 6, **page 1.3**) should be deleted. Trails and section-line easements that are legally established under RS 2477 exist regardless of the transfer of lands, unless legally vacated. Trails may be closed due to ignorance of the law and failure of agencies to record. In the interim, trails may become intermittent; but that does not mean they do not legally exist. Similarly, closures put in place by subsequent

landowners do not vacate or alter legally established trails. Such closures simply cause the public to bear the additional burden in future years of litigation and complex land deals.

***"Communities are Expanding"* page 1.3**

- The referenced "*zoning, platting, and subdivision processes*" are subject to the same laws described above if they affect legally established trails. The public should not be responsible for identifying and correcting government errors (municipal, state, or federal) concerning documentation and protection of trails which result in loss of trail access.

✓ The role of the federal government is a major gap in this chapter. There is no discussion of the role of the federal government associated with problems legally documenting and managing public trails. The reference on **page 1.4**, to "*important access routes to large blocks of public land or public water bodies,*" seems to imply that public trails are assured on federal lands but not to-and-from those lands. With 238 million acres currently under federal management, a significant percentage of trail access complaints concern federal policies and regulations.

For example, the federal government has difficulty recognizing the validity of many of the state's RS 2477 rights-of-way that occur on the 140 million acres of conservation system units established by ANILCA, despite their creation by federal statute and recognition by the courts. Many of these trails have been used for decades and are important to the access needs of the Alaskan public today and into the future. Similarly, while federal law provides avenues for designation of traditional ATV trails in these CSUs, the federal agencies largely continue to prohibit ATV use (and only in minor instances have designated trails for subsistence use).

✓ Emphasize the agency processes for trail identification, assertion and management (**page 1.5**). The responsible agencies will be more consistent in their defense of existing trails if the public is informed. A member of the public attempting to conduct detailed land status research will often require the assistance of agency employees. These employees are also responsible for researching, asserting, defending, surveying, recording, enforcing, managing, signing, and publishing existing or legal trails; so requests for assistance should recognize that everyone's time is valuable. The public can assist the agencies in a number of ways, including contacting landowners, applying for easements, organizing support for agency actions, and entering into management agreements for dedicated trails. Knowledge and good communication is the key to making the most of both public and agency efforts.

Chapter 1: Page Specific Comments

Title, "*citizens*" should be possessive "*citizens' *"

Page 1.3, line 6, delete "*s*" in "*trail*s"

Page 1.3, line 24, delete "*a*" before "*urban*"

Page 1.3, line 20, replace "*frequently do not*" with "*may not always*"

Page 1.3, line 24, delete "*Surprisingly,*" as this is not surprising to most urban Alaskans

Page 1.4, line 24, replace "*it*" with "*is*"

Page 1.5, line 2, replace "*Publicly Accessible*" with "*Reserved for Public Access*"

Chapter 2. THE STEPS: HOW TO ESTABLISH LEGAL PUBLIC ACCESS

✓ We suggest reorganizing the chapter to aid the public in first determining if the access is already legally established. This chapter encourages the public to take a series of steps in documenting and pursuing legal status of a trail that may, in fact, already be a legally established trail. Our comments on the Introduction outline an approach which is designed to save unnecessary steps.

✓ The introduction to establishing a trail should be presented as less onerous. Examples from the present listing include: "*Expect One-Step Forward, Two-Steps Back,"* and "*Pick Your Battles*." Many members of the public may close this Handbook right here, shrug their shoulders, and give up . . . even though the trail may indeed already be legally established but simply not marked by the responsible agency or illegally blocked by a landowner. Also, this introduction again tends to focus the burden on the public, for example by referencing state right-of-way applications and documentation; such applications do not apply on federal and private lands, and documentation is unnecessary if the trail already has legal status.

Paragraph 3 on **page 2.4** includes: "*…one goal of mapping the trail is to establish an accurate location in relation to property boundaries.…The best way to accomplish these goals is to map the route in relation to topographic and drainage features.*" How the second sentence above serves this goal is not clear.

The discussion of "*Rectangular Survey Sections and Meridians*" on **page 2.5** is inaccurate and confusing. A clearer explanation might be useful, perhaps as an appendix for reference only.

Regarding the discussion in the first paragraph of "*GPS Mapping,*" (**pages 2.5-2.6**) the referenced USGS maps are known to be inaccurate for both land status and trail locations. The significance is (both **pages 2.4 and 2.5**) that trails shown on USGS maps at least indicate they have historical documentation even if they are not accurately depicted.

The discussion (**page 2.6**) downplays the usefulness of GPS, although the accuracy of GPS readings on trails is still far more useful to documentation than any other technology currently available to most members of the public and agency personnel. The public should be encouraged to consult with the appropriate government entity prior to attempting to use GPS readings for land status information. Ordinary resource-grade GPS receivers are now relatively more accurate, but trails should still be mapped with differentially corrected data.

The third paragraph on **page 2.6** "*…the project has mapped 500 miles of trails . . .agencies have been establishing legal public access with the data*" should be qualified to indicate that only 6 trails have made it through the recording process. The remaining trails will probably require as-built surveys for those portions that encroach upon or cross private property.

✓ The limitations of title information derived from the Recorder's Office should be explained. It is misleading to direct the public to first verify "*if the trail has been* '*recorded*'" (**page 2.7,** lines 42-43) to determine "*who owns or manages the land, how it is presently used, and what*

uses are planned." Alaska does not require mandatory recording of title changes. Owners of land may transfer property through subdivisions, wills, court orders, and other means involving several parties, none of which must be recorded.

✓ The step-by-step process outlined on **page 2.8** and discussed in subsequent pages contains over-simplification and error.

- The limitations of state status plats, which only provide information on land transferred into state ownership, should be explained. Much of Alaska was in federal ownership and subsequently was transferred to private owners or the state. Information on federal land patented directly to private landowners (including Native corporations) is not identified on state status plats. Thus, we question why the Handbook first directs the public ("*must-do"* list on **page 2.8** and **page 2.10**) to check state status plats. It would be more appropriate to start researching land status in federal Master Title Plats (MTP) located in the Bureau of Land Management (listed on **page 2.8** but only referenced as a last resort on **page 2.11**). This is especially true considering Alaska is a non-mandatory recording state. The discussion of state land status plats on **page 2.11** indicates the Department of Natural Resources (DNR) has more plats completed and available on-line than are actually currently available. The research of case files may also be more complex than indicated.

- Discussions of the state's easement atlases (**pages 2.9-2.10**) should indicate that some easements may be noted on the maps by section and not necessarily located accurately within the section. Despite this and other limitations that are already noted in the document, the easement atlases are still an excellent resource. The example (**page 2.9**) of state easements is not a good one because this land has changed ownership through an Exxon Valdez Oil Spill settlement purchase.

- The step-by-step list (**page 2.8**) should include the Recorder's Office, which is an important source of information on recorded easements.

- Not all "*Proposed, planned, or claimed*" trails are included "*in State Area Plans and/or borough or local plans*" (**page 2.8**). State and municipal (city and borough) plans vary considerably in detail and adoption processes. Under the second bullet addressing RS 2477s, note where additional information about RS 2477s may be found in the Handbook.

- Federal unit plans should be added to the list on **page 2.8.**

The Handbook, either on **page 2.10** or in Chapter 4, Tool 11, should correctly explain RS 2477 rights-of-way. More RS 2477 routes are legal rights-of-way than have been listed to date in DNR's Land Administration System (LAS) or in the Historic Access inventory **(pages 2.10, 2.12).** The links from DNR's RS 2477 web page to individual trails gives a brief summary of many trails. Full case files are not available via the internet and many are located in Fairbanks. We request an explanation of the process to complete review and make additions to the statutory list. Only a few hundred of the known and potentially valid RS 2477s are available in LAS and the inventory. Valid RS 2477s are a legal right granted to and accepted by the state regardless of whether they are on state status plats (**page 2.12**).

- The role of Mental Health Trust lands, University lands, Alaska Railroad lands, and other specialized categories of "state" land should be included on **page 2.10**, along with an explanation of where to find out more about how access across these categories of land differ from general state land.

✓ The section on "*Federal Government Information Resources*" (**pages 2.12-2.13**) should precede the section "*Alaska DNR Information Resources*" (**pages 2.9-2.12**). The BLM section also is oversimplified and contains numerous factual errors. For example, the first paragraph, second sentence states: "*The early versions of this Department owned almost all the lands in Alaska before transferring them to either other federal agencies . . . ..*" The previous sentence refers to both the BLM and the state Department of Natural Resources. To avoid confusion, change "*this department*" to "*this Bureau*."

✓ The BLM remains the record keeper for all federal land agencies; thus executive orders and congressional action transfer only the land management authority, not the responsibility for keeping legal land records**.** When federal designation of CSUs transfers management authority from BLM to other federal agencies, BLM retains the responsibility for the Master Title Plats (**page 2.13, paragraphs 1-2)**. The designated federal land manager will be familiar with its land management plans and related regulations, in which some trails or uses are recognized; however, they do not maintain legal land status records for the federal government. The BLM's Master Title Plats are the only legal record of lands that remain in federal ownership.

The BLM Master Title Plats do not include ANCSA 17(b) easements (**page 2.13, paragraph 2)** as stated. The easements are noted on separate maps in the BLM case files, which are often the only legal record of the easements.

✓ The entire section-line easement discussion (**pages 2.13-2.14** and elsewhere in the Handbook) contains incorrect and misleading information.

- The calendar (**pages 2.13-2.14**) identifies the periods of time federal land was unreserved, not "*identifies which section lines are eligible . . . ..*" This is a key distinction. Establishing the date of federal reservation is an important first step in researching not only the status of the federal reservation but also the date of entry of the patentee of a private parcel acquired from the federal government. The calendar also assists in determining the width of the easement on each side of the section-line, as well as whether or not it exists.

- Sometimes it will be nearly impossible for a member of the public to determine if a section-line easement has been vacated (**page 2.14**). State law prohibits the vacation of easements if alternate, equivalent access is not provided. In some cases, municipalities (boroughs, cities, local governments) have been delegated land zoning and management authority from the state and have failed to recognize or have vacated easements inconsistent with state law. Thus, in some cases a vacation may have been illegal, and the public will have an important role to play in determining alternate equivalent access following agency action or litigation to reestablish legal access.

For organizational purposes and reader clarity, we recommend the discussions of "*Land Title Research*" and "*State Recorder's Offices*" be inserted earlier in the discussion. The discussion of the Recorder's Offices should again explain that Alaska is a non-mandatory recording state, meaning that land may have transferred hands multiple times and not be recorded.

✓ Discussions on "*Identifying Allowed Land Uses*" (**pages 2.15-2.16**) should follow explanations of identifying legal public access**.** There often is a significant difference between legal public access as a matter of law and allowed land uses as a matter of land management and related interpretations of law. Some specific corrections recommended for this section, regardless of where it is located in the Handbook, include:

- **Page 2.15,** first bullet "***If the land is privately owned***." Private landowners frequently will not give accurate information on the status of public trails and easements that occur on or adjacent to their land. Even legally established and recorded trails are frequently blocked by landowners, so the issue becomes one of enforcement and not of researching legal status. The public should always seek permission of the landowner to access private lands, but the private landowner is seldom an accurate source for information on "*your trail and the uses* on it" (**page 2.15, line 22**). Additionally, access methods allowed on most legal public trails do not necessarily have any relationship to, and do not necessarily need to be, "*consistent with the allowed uses of the land*." The Handbook can provide accurate information on generally allowed uses on each type of trail and information sources for determining any variances.

- **Page 2.15,** second bullet "***If the lands are owned by a Native Corporation.***" Lands owned by Native corporations are private lands and should be addressed in the first bullet. BLM is the final record holder for all ANCSA 17(b) easements statewide. This responsibility is not transferred to the Forest Service.

- Regarding the reference to the "*State Public Easement Atlas*" as "*Another good reference*" (**page 2.15**) we suggest adding *"although these atlases are not necessarily definitive"* at the end of line 38.

- **Page 2.15,** third bullet "***If the land is held by the state.***" State land may have a management plan regardless of whether it is "*legislatively designated.*" To increase the available information, we suggest providing web sites and other sources of information on public use restrictions contained within the management plans.

- Fourth and fifth bullets at top of **page 2.16** "***If the land is managed by . . .*** " Both of these paragraphs describe land managed by federal agencies and should be merged. BLM also has conservation system unit designations and/or management plans in many areas.

- The local federal land manager may be a good source of information on allowed land uses but is not necessarily in agreement with or privy to the technical status of legal trails. Interested parties should contact federal agencies to obtain copies of their management plans and associated recommended access guidelines. It is also important to ask for any formally adopted federal regulations required to implement such plans and recommendations. When

state agency representatives and the public inquire about federal and state laws regarding access methods and trails, sometimes federal agents misrepresent those laws due to lack of training or divergent administrative interpretations. The public should seek additional information from the state where state managed trails, such as omnibus roads, RS 2477s and section-line easements cross federal lands.

Table 2.1 "*Legal Access Tools for Public Lands*" (page 2.16)

- The omission of the check marks for "*RS 2477 Easements*" and "*Section Line Easements*" under "*Federal*" does not paint an accurate picture. In case of disputes, this factual Handbook should describe different points of view and not attempt to direct the public away from legal access tools. If necessary, charts could include a new symbol for a disputed tool or authority with a footnote noting how the issue is being addressed (e.g., legislation, administrative actions, judicial review).

- Permits are not normally required on federal, state, or municipal (city and borough) lands for general public access, although DNR does issue permits to construct temporary routes or low-investment trails. Some types of equipment, special events, or duration of use may require permits. The checkmarks should be removed across this row and a footnote on "*Permits*" inserted to note this distinction.

- Not all "*Land Management Plans*" can, in and of themselves, legally establish a trail nor be used to enforce a restriction on access. For example, borough plans cannot create legal access across non-borough land, and federal agency plans that call for restrictions on access must be implemented through adoption of regulations. Members of the public should become familiar with the varying opportunities and constraints associated with each agencies' planning requirements.

Table 2.2 "*Legal Access Tools for Private Lands*" (page 2.17)

Inclusion of the category for Mental Health and University lands is inappropriate in a table labeled "*Private*" lands. These are not general domain public land, but they are still state land. State land is protected against adverse possession by statute, AS 38.95.010. That statute also applies to Mental Health Trust Land, state parks, land held by DOTPF, etc. In addition, University land has its own statute, AS 14.40.291, precluding adverse possession.

✓ Under "*Step 3*" the inset "*Who will hold the right of passage?*" (**page 2.18**) omits any discussion of federal oversight, maintenance, liability, or responsibility for access. This is a major omission for the user of the Handbook given that many types of trails, easements, and rights-of-way occur on federal land.

✓ Under "*Step 4*" (**pages 2.19-2.28**) a number of issues are glossed over:

- *"Making Legal Trails Access Happen With Government"* is an incorrect title for the section beginning on **page 2.20**. It would be better titled "*Developing a Trail Project With Government*." The trail signing scenario that is described is for a trail that already has legal public access. As previously noted, a section detailing actual steps to assert and defend legal access with government should be included.

- The suggestion that public agencies can waive fee requirements for rights-of-way on **page 2.20** lines 18-19, should be deleted. The state generally does not waive such fees.

- "*There are a number of other scenarios between trail advocates and government in areas in the legalization of public access.*" (**page 2.21, line 18**) Signing of existing legal trail access should not be the only example detailed. Detailing actual steps to assert and defend legal access is important, so more specific examples should be provided, such as aerial photography, research of historical uses, habitat protection (e.g. trail hardening), support (adequate funding) for law enforcement, and public education about landowner liability and indemnification.

- Substantial deference is given throughout this section to encouraging the reader to use the State Recreation Trails Grant program. It would be helpful if the source and stability of grant funding were also discussed. The inset (**page 2.23**) only indicates funding is available for five years, which may deter pursuit of some trails where the land status is in transition or if agreements may take at least that long to be effected. Specifics of the grant's requirements, (e.g., securing landowner permission) should also be provided, perhaps as an appendix.

- The recommendation about being well prepared to work with landowners should also be noted in the sections about government. DNR has found that many individuals obtaining grants for trail work were unfamiliar with requirements for obtaining a ROW on state land.

- "*Concern 1 – Landowner Liability*" (**page 2.24**) completely omits any discussion of federal law. For example, federal law provides liability protection for Native corporation lands with 17(b) easements.

- The Handbook should clarify the intent of the statement (**page 2.24**) "*One potential weakness of A.S. 09.65.200 is that it can be argued that a trail constitutes an 'improvement' to land.*" The statute defines "unimproved" to include land with trails. Unless this has been successfully argued in court, this statement appears to support those who want to use this argument to deter public access. The inset (**page 2.25**) provides fairly convincing evidence that the state statute protecting landowners who grant access from liability has been beneficial.

- In both *Concerns 2* (**page 2.25**) *and 5* (**page 2.28**) or independently, the Handbook should explain why concern about trespass is insufficient grounds for cutting off legal public access. The reference under *Concern 2* to insufficient law enforcement should recognize this is partly a funding issue. While the trespass problem is real and needs to be addressed, insufficient enforcement is not a legal justification for terminating public access.

- We recommend expansion of *Concern 3* (**pages 2.26-2.27**) to note that not all agencies have funds budgeted for trail maintenance. DNR's Division of Mining, Land and Water Management, for example, is not funded for trail maintenance. It would also be helpful to point out that some maintenance requires additional permits, such as Title 16 permits from the Alaska Department of Fish and Game (ADF&G) when crossing anadromous streams.

✓ In "*Step 5*" (**pages 2.28-2.29**), clarify that the agreement can be recommended but not required to be recorded. Also, lines 9-10 of **page 2.29** should be corrected: cooperative agreements and landowner agreements generally are recordable documents.

Chapter 2 Page Specific Comments

Page 2.1, line 31, add "*s*" to "*phase*"

Page 2.2, line 2, add "*s*" to "*government*"

Page 2.2, line 3, replace "*that*" with "*where*"

Page 2.3, line 13, delete "*s*" in "*Trails*"

Page 2.4, line 10, delete "*s*" in "*trails*"

Page 2.4, line 18, replace "*each*" with "*inch*"

Page 2.4, line 19, delete "*s*" in "*miles*" and replace "*is*" with "*are*"

Page 2.4, line 24, revise "*in the case that public*" to "*in cases where public*"

Page 2.4, Figure 2.2, change "*section line is one mile in length*" to "*section is one square mile.*"

Page 2.5, Inset "*Rectangular . . . Meridians,*" line 7 of para. 2, delete "*one*"

Page 2.5, Inset "*Rectangular . . . Meridians,*" line 2 of para. 3, delete "*to*"

Page 2.6, line 44, insert "*(DRG)*" after "*digital raster graphic*"

Page 2.7, line 38. delete this unnecessary "*dance*" sentence

Page 2.9, last para., insert "*Kodiak*"

Page 2.10, line 38, replace "*as*" with "*at*"

Page 2.12, line 6, delete "*proposed,*" and rewrite last sentence to reflect state "*acceptance*" (not successful assertion) of the right-of-way.

Page 2.12, line 10, replace "*gotcha*" with something like "*problem*" or "*limitation*"

Page 2.12, lines 26-28, delete last sentence

Page 2.12, para. 4, rewrite to provide facts, then merge with para. 3

Page 2.12, line 40, add "*with*" after "*talk*"

Page 2.12, lines 42-43, change "*may be acquainted with*" to "*may be able to assist you in determining*"

Page 2.13, line 25, change "*a*" to "*are"*

Page 2.13, line 37, add "*s*" to "*government*"

Page 2.13, line 38, change "*addresses*" to "*address(es)*"

Page 2.14, line 33, replace "*advocates*" with "*researchers*"

Page 2.15, line 2, delete the sentence in parentheses

Page 2.15, line 34: change "*an*" to "*a.*" In lines 34-35, change "*17b*" to "*17(b)*"

Page 2.15, line 42, delete "*is*" and in line 45, change "*it's*" to "*its*"

Page 2.16, line 15, add "*and/or enforcement*" after "*establishment*"

Page 2.16, lines 13-14, delete the "dance" phrase in parentheses

Page 2.16, lines 19-26, superfluous—delete all of these two paragraphs except the last sentence

Page 2.20, line 19, add "*s*" to "*project*"

Page 2.20, line 20, delete "*a*" after "*in*"

Page 2.20, lines 23 and 27, delete "*s*" in "*trails*"

Page 2.21, lines 21-22, delete "*And,"* then capitalize "*one*"

Page 2.22, lines 7-8, delete "*and will soon be passing on*"

Page 2.25, line 5 of boxed inset, add "*ly*" to "*private*"

Page 2.27, line 16, replace "*long uphill battle*" with "*lengthy negotiation" (or "litigation")*

Page 2.28, *Concern 5* (throughout), change "*17b*" to "*17(b)*"

Page 2.29, line 33, change "*a*" to "*are*"

Chapter 3. LEGAL ACCESS TOOLS FOR TRAILS ON PUBLIC LANDS

See our suggestions concerning the introduction for alternate organizations. The separate categorization of refuge/park land from multiple use land raises some interesting contrasts which should be brought out in the Handbook. The public has an inherent right of access across all public land, regardless of management. So long as the land remains public, no further legal protection is necessary. By one line of thinking, CSUs and other legislatively protected areas provide a higher degree of "protection" for trails since recreational access is part of their mandate. Multiple use lands, however, are subject to disposal or development which could preclude access, unless easements are reserved in advance.

There is, however, another way of looking at this. Federal parks and refuges have used their authority to restrict types of access. Hence, a trail might be protected but legal access restricted. For example, ORVs have been used in rural Alaska as a traditional means of access, although there are few opportunities to use ORV trails in CSUs. Officials responsible for backcountry planning for Alaska parks are considering limiting some areas to non-motorized recreational use. For some people, limiting motorized access is the equivalent of no access. Without getting into a site-specific debate, the Handbook should recognize the importance of this eternal Alaska issue.

"***refuge and park lands***" (**page 3.1**)

- There is considerable difference between types of access protection and trail designations that exist for federally designated conservation system units (CSUs) under ANILCA (e.g., refuges, parks, monuments, wilderness, wild & scenic rivers, conservation and recreation areas) and non-CSU federal land, and between federal and state legislatively designated areas. ANILCA Title XI and Section 810 access provisions for federal lands apply regardless of type of federal designation and do not apply on state or private lands. In contrast, some types of trails are protected by legal public rights-of-way regardless of landowner.

- Differing statutory provisions for federal versus state land designations, as well as differing interpretations of authorities, should be factually clarified. **Page 3.4** notes that "*if the land manager determines that your proposed trail use* [is] *incompatible with the purposes of the unit, you may be in for an uphill battle*." The Handbook should explain that sometimes there will be disagreements about how much control the landowner has over use of the trail even when a legal access route has been secured. In addition, revise "*what is really a land allocation issue*" to something like "*what is perceived as a land use issue.*"

"***multiple-use lands***" (**page 3.1**)

- Access protections differ among federal and state lands, based on statutory guidance and subsequent regulations**.** Combining state and federal lands does not help the public understand differences for "*trail legalization.*" We also wish to caution against potential implications that trail legalization is different for multiple-use lands than for refuge and park lands. Recognizing and understanding differences in enabling legislation is important.

- The categorization of "Multiple Use Lands" on **pages 3.4-3.5** fails to recognize that some national forest and BLM land in Alaska have areas designated by ANILCA for protective purposes, such as Wilderness. Therefore, revise the parenthetical phrase to read ("*such as general state land and most national forest and Bureau of Land Management lands*").

"***urban and suburban municipal lands***" (**page 3.1**)

- This section fails to recognize the importance of section-line easements to transportation and utility corridors through municipalities. This is another inappropriate grouping in that the last sentence states "*the majority of these lands are usually private.*"

- In addition, there is no reference made to AS 38.05.127. This statute requires that before any state land can be conveyed to a city, borough, or private individual, public access must be reserved "to and along" all navigable and public waters. These easements may or may not show up on status plats. However, they are an important component of any trail system.

"***state highways and rights-of-way***" (**page 3.1**)

State highways established under AS 19.05.001(8) are not typically viewed as a form of public land but as a form of access; hence, this grouping may be potentially confusing. The state does not always own the public land underlying a state highway or right-of-way. Consequently, the types of public uses allowed may vary depending on the underlying landowner. For instance, the Seward Highway is generally maintained and managed by DOT/PF. In addition to traditional highway uses, the public is allowed to use a portion of the right-of-way for access to the Inlet or hillside. However, once the highway enters into the Chugach National Forest, where the Forest Service controls the land underlying the highway, the allowed uses may be adjusted based on their authorities.

- This discussion also omits important rights-of-way for transportation and utilities which exist in the form of section-line easements. Where highway or utility uses in these easements are under permit, their management is primarily overseen by the Alaska Department of Transportation and Public Facilities, but the general management of these easements for general public access is retained by the Alaska Department of Natural Resources.

Much of the discussion following the grouping of types of public land provides additional details for each tool listed in Table 2.1 (**page 2.16**) and repeated in Table 3.1 (**page 3.2**). The types of easements and tools would be more valuable as a base for public understanding of options in the first chapter. Once research on the legality of a public access trail is complete as described in Chapter 2, the public can then work with the appropriate public agency to secure the legal access.

Errors noted for Table 2.1 need identical correction in **Table 3.1** (**page 3.2**):

- The use of permits on state land should have a footnote or other explanation per our comments on Table 2.1.
- RS 2477 rights-of-way, including section-line easements, exist on federal land.
- Not all "*Management Plans*" can grant or restrict legal access.
- What is meant by "*local govt. has taken trails 'powers'*"? The Handbook should note, in footnote or text, that municipalities can elect to exercise those authorities granted to them by the state (AS 29.35). First and second class boroughs can exercise road powers but aren't forced to do so. Third class boroughs (Haines is the only one) can not use road powers on an areawide basis, but can create local service areas. AS 19.30.111-251 helps to fund municipalities' "local roads and trails." AS 29.60.110 helps to fund municipal transportation improvements, including trails.

"*Tool 3 - Public Lands Management Planning and Designation*" (**page 3.4**) The introduction to this section should recognize the importance of the differences in enabling legislation and subsequent regulations for the various types of public land. Planning is only one aspect of the baseline information needed to understand the opportunities and constraints of each management category.

✓ The term "*municipal"* is misused throughout this chapter. "*Municipal*" governments are both cities and boroughs, organized under state law. (See page-specific edits.) The Handbook should clarify that state law delegates some state authorities to municipalities under specific conditions. It would be helpful to present delegated state authorities for zoning activities and easement management accurately so that the public would also understand the authorities of each entity.

For example, the explanation of authorities vested in the municipalities versus those retained by the state is largely incorrect in paragraph 1, **page 3.7**. Municipalities assume platting authority by adopting an ordinance under Title 29. However, municipalities do not have the authority to record property; municipalities only have the authority to establish property boundaries.

✓ The discussions throughout this chapter regarding rights-of-way and easements should be substantially rewritten. Examples include:

- In "*Tool 4 Public Lands Rights of Way and Easements*" (**page 3.5**) the first paragraph contradicts itself in stating: "*The highest level of protection . . . on public lands is the establishment of public right-of-way* [sic] *or an easement*" then two lines down states "*fee simple ownership is a higher level of protection*." The next paragraph fails to note that rights-of-way can be created for specific lengths of time or in perpetuity, in part depending upon statutory directives. If the trail or road has high volume use, then the state would usually find an alternate route or a combination of new and old routes for the public to use.

- The section-line easement discussion in paragraphs 1-3 of **page 3.3** does not accurately reflect state law, permitting authorities, and management responsibilities. Furthermore, paragraph 3 needs to clarify that permits are needed from ADF&G for any work affecting anadromous streams or in special areas.

- **Page 3.3**. In line 33, delete the word "perceived" before "security threats" or add "and safety concerns." Concern about public access across state airports stems from real, not perceived, safety threats, as people and vehicles crossing or using active runways or taxiways create a hazard for aircraft.

- The **page 3.6** inset "*What's the Difference Between a ROW and an Easement*" is confusing and the differences are not delineated. Similar confusion in the use of terms appears throughout *Tool 4.2.2. State ROWs* on **page 3.9**, where the Handbook should depict more thoroughly and accurately the differences between "*ROWs*" and "*state access easement*s." At the most basic level, a right-of-way is variously used to describe either a fee interest or a right of passage only, whereas "easement" is almost always understood to mean a right of passage only. At a minimum, the Handbook should define and adopt a consistent approach for both terms. By the same token, it is important to educate the public that definitions are not standardized among agencies. We would like to work with you on a rewrite of the box.

- None of the discussion on **page 3.6** explains the differences in <u>establishment</u> of ROWs and easements on private lands versus public lands, or on state public land versus federal public land. No explanation is given for applications on Mental Health Trust Land or University Land. The last paragraph on **page 3.6** speaks only to ROWs and easements established on "*public lands*," but this is not readily apparent on first reading.

- **Page 3.9**, Tool 4.2.1: Before clearing any trail, individuals should check current DNR Fact Sheets for generally allowed uses. These are accessible on the DNR web site.

- **Page 3.9**, Tool 4.2.2, last paragraph: DGC takes the lead in coordinating a federal permit application under the Alaska Coastal Management Program if it is within the coastal zone and two or more state agencies are involved. If DNR is the only agency involved in permitting, DNR coordinates the review.

- The discussion of section-line easements on **pages 3.11-3.16** is both erroneous and one-sided regarding their creation and their uses, for example:

    - This general discussion contains a bias in favor of recreational trails over other legitimate public needs, such as roads and highways. Trails and other types of development must strike a reasonable balance. Sections lines were originally put in place for road use (see Alaska Statute 19.10.010). Utility lines and trail use on section-lines is secondary. Advocating that trails are the best use of section-line easements is not appropriate in this document. How section-line easements will be used is determined on a case-by-case basis.

- Section-line easements were created under both state and federal (specifically RS 2477) law (**page 3.11 and 3.13**). State law authorizes acceptance of the offer made by federal law. Also, all such easements do not always occur on land currently or previously owned by the state.

- Section-line easements (**page 3.11**) range in width from 33 ft to 100 ft, with 33 ft and 66 ft being the most common on federal lands. State law creates easements of 50 ft on each side of section-lines for land owned by the state. To address the points above and other difficulties, the following is a rewrite of the last paragraph on **Page 3.11** that carries over to the next page:

  > A section-line easement is an easement accepted or reserved under state law for a public highway. Section-line easements are between 33 and 100 feet wide. Unless the easement has been "vacated," each section-line has an easement and is a potential route for a "highway" (including recreational trails) if:
  >
  > 1. it was surveyed land owned by or acquired from the Territory (or State) of Alaska at any time between April 6, 1923, and January 18, 1949, or at any time between March 26, 1951, and June 30, 1960;
  > 2. it was surveyed, unappropriated, unreserved federal land at any time between April 6, 1923, and January 18, 1949, or at any time between March 21, 1953, and December 14, 1968;
  > 3. it was surveyed or unsurveyed land owned by or acquired from the State of Alaska at any time after June 30, 1960.

  DNR is developing a table that includes dates and corresponding easement widths which may be a preferable way to present some of the information above. The Handbook should also clarify that section-line easements are not extinguished during sale or transfer to subsequent landowners.

- The references to "surveyed" section-lines (**page 3.11,** line 20 and **page 3.13**, line 16) should clarify that section-lines on state land include protracted surveys. However, DNR requires that before using equipment to clear a section-line easement based on a protracted survey, the easement should be surveyed on the ground to insure correct placement. The Handbook should also note there is some disagreement about whether protracted survey lines on federal land are also subject to section-line easements.

- Permitting for some uses on section-line easements is also done by the Alaska Department of Transportation and Public Facilities (DOTPF) under agreement with the Department of Natural Resources (**page 3.12,** para. 1). The role of DOTPF is omitted.

- Section-line easements can only be vacated (**page 3.13-3.14**) under specific criteria laid out in state law, including the existence of equivalent, alternate access for current and future public uses.

- **Page 3.13**, line 10 notes that section-line easements, if valid, "are located on private lands." Technically, the private land conveyance is "subject to" the easement.

- The inset box on **page 3.14** is extremely biased. Statements of fact, explanation of differing interpretations, and problems in application should be carefully and accurately presented.

- The discussion of municipal authorities regarding limits on private property subdivisions is incorrect and incomplete (**pages 3.15-3.16**).

✓ Throughout this chapter lies a fundamental misunderstanding of platting, including platting authorities. Examples include:

- Federal platting authorities are incorrectly explained (**page 3.7**). Only BLM can subdivide or dispose of federal lands; "*the individual* [federal] *agency*" does not have platting authority.

- The inset "*Platting vs. Plotting and Mapping vs. Surveying*" on **page 3.8** is incorrect. The term "*Platting*" does have a precise definition and is not "*used interchangeably with the words 'map', 'chart', or 'plot'.*" A "*plat*" is defined in the standard surveyor's manual, Definitions of Surveying and Associated Terms, as follows:

  - A diagram drawn to scale showing all essential data pertaining to the boundaries and subdivisions of a tract of land, as determined by survey or protraction.

  - A plat should show all data required for a complete and accurate description of the land which it delineates, including the bearings (or azimuths) and lengths of the boundaries of each subdivision. A plat may constitute a legal description of the land and be used in lieu of a written description.

  - plat, subdivision – A map of subdivision of land, usually prepared in accordance with state plat statutes or local subdivision regulations or both.

  There are other definitions of plat from this source which outline the special case definitions of status plats, highway right-of-way plats and plats as applied to BLM surveys. However, these special case definitions do not apply to the platting of trails.

  Platting vs. plotting is really a distinction between creating a legal document and the physical act of plotting information on paper or other media. This distinction also differentiates platting vs. mapping in most cases, and the comparison of surveying to mapping is probably of little benefit in the Handbook. Surveying does not always include setting monumentation, but it does require locating sufficient evidence to determine the boundaries of the property or easement being surveyed.

✓ The discussion of RS 2477s on federal lands (**page 3.8, Tool 4.1, para. 2**) does not recognize legitimate differences in interpretation of the law. Such differences should be explained in this Handbook rather than using it as a platform for one view. Valid RS 2477s are public rights-of-

way accepted by the state through public use or other government acceptance prior to the federal reservation regardless of whether "*recognized by a federal agency.*" They are legitimate public access routes; not an "*adversarial method of gaining access*." Only the courts can resolve disputes, however, if the parties cannot agree whether a trail is a valid RS 2477.

✓ The discussion of 17(b) easements (**pages 3.8-3.9, Tool 4.2**) is minimal and incorrect. Most 17(b) easements allow for motorized use. ANCSA 17(b) easements are reserved by the BLM on lands conveyed to Native corporations (not state lands) to provide public access to and between state and federal public lands and waters. These easements are not just "*public access routes*" but also include site easements.

✓ The "Silver Bullet" discussion of DGPS (**page 3.11**) and related discussions of platting regulations indicate a lack of understanding of surveying and platting authorities. The box should probably be removed. Differential GPS technology, in some cases, does allow for the mapping of trails adequately for public land management purposes. However, DGPS is just a measuring tool. A Trail Location Diagram (TLD) is not a survey. The acceptance of TLD vs. as-built surveys is not just an issue of accuracy. Resource-grade differential GPS has been used by DNR to create as-built surveys of trails. The stamp of a Registered Land Surveyor demonstrates that the creator of the as-built has the technical knowledge necessary to properly create it and is accepting professional responsibility (and liability) for the information shown. This is a legal protection and assurance of quality for the landowner or land manager.

The Handbook displays a fundamental misunderstanding of the TLDs that NPS has been preparing under a cooperative agreement with DNR. DNR needs to know where a trail lies for management purposes so that they don't allow another use to encroach. Often a survey is necessary; but at times a TLD, controlled aerial photo, topographic map or other documentation is adequate. TLDs are prepared using differential GPS to gather information but several key elements are missing which are necessary for a survey. Because of this, a TLD is inadequate to protect the bona fide rights of landowners. The TLD does not control the location of the easement; the physical trail on the ground controls.

In those cases where the state is accepting the TLD, instead of a survey, the land managers are making the decision that a map of the trail, using differential GPS, is sufficient to help them manage the trail easement and the encompassing land. The diagram allows the land manager to protect the trail easement adequately when making future management decisions and alerts the manager to the potential need for a survey before potentially conflicting uses, such as land disposals or leases are authorized in the area.

Using a TLD to document an easement basically means the easement moves with the physical location of the trail, as noted in another part of the Handbook. On much of state public land, trail use is already a generally allowed use, so that a movable trail easement may be consistent with public land management policies. For a private landowner or for land that is not being managed as general public land, a non-fixed location of the easement is probably not in the best interest of the landowner or land manager. A movable trail does not adequately protect the owner's rights by restricting public access to a limited easement in a fixed position that can be located in the field from information provided in a legal description, survey plat or as-built drawing. It is

unwise for the NPS to advocate that landowners, especially private landowners, accept such easements, without being very clear that their property rights would be less protected by accepting trail location diagrams.

Implying that a "lack of knowledge" might be the reason for reluctance to accept trail location diagrams, or possibly even raw GPS data, shows a lack of respect for experienced professionals running the platting authorities. The Handbook itself demonstrates a lack of knowledge of the duties and perspectives of those land managers.

Several places in the Handbook advocate changes in platting regulations that would allow non-surveyors to file plats. The state strongly opposes this approach. After a very lengthy process, laws have been passed in the last few years that toughen the platting regulations in the state, even for licensed surveyors. New law requires that plats must be reviewed for basic minimum requirements and approved by the platting authority. This law is a step in correcting problems that are created by inadequate, but still legally binding, plats that were all too common in the past. Easements do not usually require plats and, in fact, usually only require a survey if the landowner requires a survey. Landowners and managers require survey of public access easements in order to protect their other property rights.

Finally, this Handbook seems to imply that allowing use of DGPS without requiring a licensed land surveyor would somehow make it possible for almost anyone to get an easement mapped for use on state and other lands. Outside of the surveying profession, there are only a few resource managers and GIS professionals who would be qualified to properly collect DGPS data and who could readily produce what has been accepted as a TLD.

It should also be noted that the "State acceptance of DGPS data for state lands…" as represented in the Minimum Mapping Requirements, apply in limited situations only.

Chapter 3 Page Specific Comments

Page 3.1, line 11: Change "*borough/or municipal*" to "*municipal.*"

Page 3.1, line 16, change "*borough or local*" to "*municipal*"

Page 3.1, 3rd bullet, "*urban . . . lands*", change "*municipal boundaries or organized boroughs*" and "*borough or municipally owned*" to "*municipalities.*"

Page 3.1, line 37, delete "*borough,*"

Page 3.2, line 15, delete the repeated phrase "*by using*"

Page 3.3, line 6, insert "*such as a federal agency,"* after "*underlying landowner*"

Page 3.3, line 24, add "*sanctuaries*" to the list of state legislated areas requiring permits

Page 3.4, line 36, change "*gain*" to "*to obtain*"

Page 3.4, line 37, change "*in*" to "*is*"

Page 3.5, line 2, change "*an*" to "*a*"

Page 3.5, line 4, delete "*and boroughs*"

Page 3.5, line 28, insert "*to*" after "*opportunity*"

Page 3.5, line 42, delete "*public*"; line 43, delete "*is*"; line 46, replace "*is recorded*" with "*occurs*"

Page 3.5, line 43, change "*assigned*" to "*created*".

Page 3.5, lines 45-46, revise sentence to read: "*Once granted, this right runs with the land.*"

Page 3.6, line 3, revise to eliminate the three "*for*"s

Page 3.7, line 6, delete "*be*"; line 8, delete "*received,*" and "*and borough*"; line 9, delete "*, and to legally record*"; line 12, replace "*at local and borough*" with "*by municipalities*"; line 15, replace "*agency*" with "*state agencies'*"

Page 3.8, line 26, clarify what is meant by "*ADL easements*"; line 28, change "*wide*" to "*width*"

Page 3.9, carryover para., line 1, delete "*, and allow non-motorized and certain types of mechanized transport*"; and line 3, delete "*Section line*"

Page 3.9, Tool 4.2.2: Re-title this tool "*State Public Access Easements*."

Page 3.9, line 25, replace "*is an*" with "*has*"

Page 3.11, line 8, delete "*y*" in "*every*"

Page 3.11, line 16, replace "*granted under state law*" with "*created under federal and state law*"

Page 3.13, line 23, change "*local or borough*" to "*municipal*"

Page 3.14, inset paragraph 2, line 4, delete "*their*"; line 5, delete "*to*"

Page 3.14, 1st paragraph: The first sentence should read: "*While the need for public access is important, the rights and responsibilities of adjacent landowners are also important*."

Page 3.16, 1st paragraph, line1, "*...application and plat mapping*." – One doesn't plat maps or map plats.

Chapter 4. LEGAL ACCESS TOOLS FOR TRAILS ACROSS PRIVATE LANDS

✓ We suggest consolidating discussions of access across private lands**.** See earlier suggestions for an alternate organizational approach which addresses types of access, then differences among different landowners. The presentation of information in Chapters 4 and 5 should start with the provisions which are common to all private land, then elaborate on the special requirements associated with Native lands. Many legal provisions affecting access tools are the same regardless of which owner holds title to private land. Where to find specifics for Native corporation lands should be moved to the first paragraph of Chapter 4.

Figure 4.1 is not helpful in illustrating the discussion of private property ownership and access issues. To make it work, add a legend to explain what is private versus public land, include valid section-line easements or note if they are omitted, and label other subdivision roads or trails.

We request the discussion on University land and Mental Health Trust land (**page 4.2,** paragraph 1) be modified to explain that the state can reserve trails in conveyance documents.

✓ The discussion of prescriptive easements (**pages 4.3-4.4** carryover paragraph) is incomplete. Conditioning easements with period closures by private landowners is unrelated to the legal situation necessary to assert a prescriptive easement. A prescriptive easement claim is present where public access occurs with the knowledge of, but without specific permission from, the private landowner, who after some period of time then attempts to stop the access.

✓ The discussion of liability indemnification for trails (**page 4.4**, Tool 7, paragraph 2) incorrectly implies that it is only available through a public agency. As noted on **page 2.24** (and clarified in our corresponding comments), state law already provides some liability protection to the private landowner and non-profit organizations for both trails and easements. Specifically, AS 09.65.200, provides tort immunity for personal injuries occurring on "unimproved land," which is defined to include land with trails. There is also a new law, AS 34.17.055, covering tort immunity for personal injuries or death arising out of use of land subject to a conservation easement. Known commonly as the Landowner Liability Law, this law provides some immunity in addition to the immunity provided by AS 09.65.200. This law only applies to a recreational trail easement granted to and accepted by a public agency, in this case the state or a municipality. Trail sponsors and landowners should be encouraged to research the statutes carefully to know what liabilities are or are not covered. This paragraph also needs to be corrected to note that some easements are not necessarily "*perpetual*," as they can be extinguished if not used (i.e., 17(b) easements) or used in a manner inconsistent with the easement grant.

✓ The discussion of easement purposes and acquisition in Tools 7 8, 9, and 10 (**pages 4.4-4.6**) is incomplete and inaccurate**.** Examples include:

- The Handbook is confusing as to when easement acquisition by separate instrument is or is not a covenant of title. There is no clear explanation of who is responsible for subdivision easements and what entity has oversight.

- **Pages 4.4-4.5**, Tools 7 and 8, under both leases and deed restrictions/covenants, the Handbook refers to possible public funding of such purchases. It should be noted that the state does not have funding set aside for these types of purchases, so funding would need to be part of the trail package.

- **Page 4.5**, Tool 8, second paragraph: Covenants are essentially easements, as described in Tool #9; they are just put in place in a different way.

- The third sentence under paragraph 1 of Tool 9 (**page 4.5**) is incorrect. Easements located in subdivisions are established for many different purposes, not just "*recovering public access to trails*." For example, under state law, subdivisions of state land must reserve public access to and along navigable or public waterways. In some instances, easements preserve public access that existed, but, prior to being subdivided there was no need to reserve the access. In other instances, easements may be used to re-route public access.

- Paragraph 2 under Tool 9 on **page 4.5** should be deleted as it contains no facts.

- Paragraph 4 (**page 4.5 carryover to 4.6**) overlooks the issue of access across federal conservation system units to private lands for their economic development, which is provided in ANILCA 1110(b). Given that federal lands comprise over 60% of the state, protection of public access to and across these lands is an important federal responsibility.

- The discussion of easements in the Fairbanks borough (**page 4.6,** paragraph 1) should clarify that private land in the borough is not exempt from section-line easements. The width of borough-created easements may vary from that for section-line easements. The relationship of different easements within subdivisions of municipalities is not explained.

- Omit the statement: "*Other landowner needs would probably still be unmet, such as impacts from adjacent trail use, fears of trespass,...*" (**page 4.6,** paragraph 2). Enforcement against trespass is a separate issue from preservation of public access rights, with laws related to each. A trespass problem is not a legal justification for terminating public access.

- We recommend that Tool 8 (**page 4.5**) and Tool 10 (**page 4.6**) be combined. As written, the differences between deed restrictions and private land easements is not clear.

- We disagree that liability indemnification is not covered in state law for trail use allowed by landowners (**page 4.7**, sentence stating on line 38). See previous comments concerning **page 2.4** and Tool 7 on **page 4.4**. This statement also overlooks the fact that permitted utilities in section-line easements do not foreclose continued public rights of access.

✓ There is a legal distinction between "*prescription*" and "*adverse possession*," contrary to the impression given in Tool 10.2 (**page 4.8,** paragraph 1). The distinction hinges on what interest the adverse user acquires--title vs. an easement. Furthermore, easements are not rights of possession, as paragraphs 3-4 imply, but are rights of use. We also disagree that ANCSA lands (paragraph 1) are universally exempt from prescriptive easements. Only undeveloped, unleased lands still owned by an ANCSA corporation are exempt. This Tool ends with inappropriate directions to the public to consult with employees in DNR for advice on prescriptive easements. DNR has neither the staff nor the expertise to provide such advice. We request that where the need for additional advice is recognized, the public should be directed to seek legal advice from an attorney.

✓ The discussion in "*Tool 11 – R.S. 2477 Trails*" (**page 4.9-4.11**) is prejudiced against these public rights-of-way. Recognizing the controversy associated with RS 2477s is fine, but the facts and differing legal interpretations should be presented without biased viewpoint.

- Delete the first sentence (**page 4.9, para. 1)**. RS 2477s are not created by adverse possession but exist by virtue of a federal statute granting public rights-of-way to the states. Many section-line easements are also RS 2477 rights-of-way, but there is no section of the Mining Law of 1866 that specifically creates section-line easements. Some section-line easements were created by virtue of enactment of the state law which accepted the federal offer of a right-of-way made in RS 2477.

- Delete the opinion (**page 4.9, para. 3**) that "*The ultimate effectiveness of using RS 2477 . . . is questionable at best*." The ultimate effectiveness of many of the tools addressed in this Handbook is also unknown. The federal courts have recognized the validity of these public rights-of-way, either as section-line easements or due to public use that pre-dated federal reservation. When the federal government attempted to preempt state authority to manage the states' rights-of-way by publishing proposed regulations, congressional action ensued. The agreement between the State of Alaska and BLM on a process to recognize these rights-of-way was halted due to political intervention—not "*the release of <u>proposed</u> federal RS 2477 regulations.*"

- Paragraph 5 on **page 4.9** fails to recognize that recent litigation in Fairbanks on an RS 2477 that crossed BLM land is being settled this year with BLM assisting in the identification and recording of the trail. It is inaccurate to say that the policies and new laws have not materialized due to a congressional stalemate. The stalemate is between the Department of the Interior and Congress.

✓ <u>RS 2477s are state asserted rights-of-way regardless of whether they are identified as an RST in AS 19.30.400 (para. 1**, page 4.10**).</u> The Handbook needs to explain this factually and clearly to the user, not just refer users to the state website. The discussion should also explain that when trails are identified in AS 19.30.400, the state is asserting a right-of-way whether or not it is found by the courts to be an RS 2477.

✓ <u>RS 2477s, including section-line easements, like most other rights-of-way, are reserved at a specific width, but this does not mean the whole width has to be used.</u> (**page 4.10,** para. 3) This paragraph is biased. As state rights-of-way, the state may chose to adopt regulations to manage individual or groups of RS 2477s to limit certain uses and width of use regardless of asserting management of the entire legal width. If a public access route predates the reservation of the land, the rights-of-way are held by the state for public use whether or not a simple narrow trail suffices. Stating "*if the trail exists at all*" at the end of the paragraph is unnecessary. The public would be better served by a factual explanation that section-line easements need not be physically built to exist as public rights-of-way. Also, trails that pre-date reservation of the land can be managed by the state to minimize the width and impact of use.

Paragraph 4 on **page 4.10** continues the bias by coloring an assertion of public rights-of-way as "*throwing the gauntlet down*" which will "*probably create ill-will with the landowners*." Public rights-of-way are just that—rights-of-way which predate the landowner's claim. Also, RS 2477s may be considered more permanent than other options the Handbook advocates; indeed they "*may be one of the only practical means of gaining public access*." Assertion of a prescriptive easement can also generate "*ill-will*," but is not similarly maligned.

Tool 12—Private Land Title Acquisitions (**pages 4.11-4.12**)—this section needs to be corrected to explain clearly that the title of land purchased by or donated to the state is held by DNR, regardless of what state agency manages it. As the owner, DNR should be included in any negotiations.

"*Tool 12.1 Eminent Domain*" (**page 4.12**). The first sentence should be revised to read: "*Eminent Domain is a process by which governments assert their authority to require the sale of some portion of private land for public purposes.*" Delete "*commonly*" in the next sentence. The first sentence of the second paragraph should be moved to the end of the first paragraph. The rest of the second paragraph should be deleted as it offers little beyond an editorial view.

Chapter 4 Page Specific Comments

Page 4.2, line 6, add "*s*" to "*Individual*"; line 11, delete "*for*"

Page 4.3, continuation of Table 4.1, insert an asterisk on "*ANCSA*" and spell out Alaska in the footnote

Page 4.3, line 22, delete "*provide to*"

Page 4.4, second bullet, delete the possessive mark on "*days*"

Page 4.5, line 23, replace "*local, borough*" with "*municipal*"; line 27, change "*should of* "to "*should have*"

Page 4.5, line 38, add "*s*" to "*easement*"

Page 4.7, line 37, add "*al*" to "*recreation*" and delete "*the*" after "*on*"

Page 4.7, line 45, delete "*a*" after "*to*"

Page 4.9, line 13, delete "*s*" at end of "*rights-of-ways*"

Page 4.9, line 20, replace "*had been* with "*were*"

Page 4.9, line 31, delete the apostrophe in "*1980's*" as it is not possessive

Page 4.9, lines 32, 36, and 48, delete the apostrophe in "*ROW's*"—none are possessive

Page 4.10, lines 3, 13, and 25, delete the apostrophe in "*ROW's*"

Page 4.10, line 18, change "*effect*" to "*affect*"

Chapter 5. LEGAL ACCESS TOOLS FOR TRAILS ACROSS PRIVATE NATIVE LANDS

As indicated in our review of Chapter 4, we suggest all discussions of access across private land be included in the same chapter. Paragraphs 3-4 of the introductory section (**Page 5.1**) would benefit by the following improvements:

- The introduction should clearly distinguish ANCSA corporation land from Native allotments. We suggest a few paragraphs be devoted specifically to the legal background and different management of allotments, separate from the legal evolution of corporation lands. For example, it would be helpful to address 17(b) easements.

- The discussion of title established by the Native Allotment Act fails to recognize that the Act was modified in 1980 by ANILCA Section 905. A recent Native veteran bill provides additional title opportunities. Revise the phrase "*generally treated as private lands*"—they are private lands but with restricted title.

- Revise the discussion of ANCSA lands regarding "*taxation*" and "*incentives*" or delete the discussion as it is unrelated to the provision of trails. ANILCA established the land bank provisions to avoid taxation but few have been set up. Furthermore, ANCSA was amended to extend the time period before taxation applies to those lands. Native allotments in restricted status or held in trust are not taxable. Line 38 on **page 5.1** refers to "*Native corp. lands, including Native allotments*." Allotments are not owned or controlled by ANCSA corporations, other than the subsurface interest in some allotments.

Section on ANCSA 17(b) easements (**pages 5.2-5.3**):

- As previously noted, these easements provide access to and between both public lands and public waters**.** Thus throughout this section we request every reference to public lands be corrected to read "*land/water*."

- In addition to trail easements, ANCSA 17(b) provides site easements for changing transportation modes and limited (24 hour) camping. These site easements are mentioned only once (**page 5.2,** paragraph 3). We request they be referenced more frequently to prevent a casual reader from overlooking this important type of easement.

- Easements are reserved, not "*platted*." This distinction needs to be corrected on **page 5.2**, line 41 and in the title on **page 5.3**.

Corrections and additions are needed in the discussion on **page 5.3** describing the black or blue line maps, which are available at BLM for researching easement information:

- The maps show all selected land, including lands selected by regional corporations, not just "*selected village lands*" (paragraphs 3 and 5). More importantly, "*selected*" needs to be clarified. The maps do not distinguish between those lands that remain in selected status versus those that have already been Interim Conveyed or patented. In addition, because most village and regional corporations have made overselections, there is a possibility that some of the land identified will remain in public ownership. Also, when land has been selected by two or more corporations, the maps do not identify which entity has priority, if any.

- The maps depict reserved easements as well as those "*proposed*. *"* (para. 3).

- Although "*case files can be accessed through BLM's Online Automated Land Information System,*" not all are automated yet. (para. 4)

- The last sentence on **page 5.3** should be revised. For example, "*the easement doesn't exist*" probably was intended to mean (and more correctly would be stated) "*the easement is not reserved ....*" A trail can exist on the ground on selected land that is still in public ownership and be used for public access until conveyed. Likewise, a trail that does not exist on the ground but is requested in an upcoming conveyance is not necessary for public access until interim conveyance. Also, the easement is reserved under 17(b) when the land is interim conveyed or patented, not upon the corporation receiving "*title*."

The inset box "***More Conveyance Details***" on **page 5.5** contains misleading statements, incorrect terminology and doesn't add much of substance beyond the preceding paragraph. We suggest deleting it. Some examples of problems include:

- Referring to conveyances as "*preliminary.*" Interim Conveyed lands have already been reviewed by BLM and have been conveyed to the corporation, although the acreage has not been solidified by survey. There's nothing "*preliminary*" about the conveyance.

- The "*conformance*" process determines if the easements conform to the regulations, not if "*the uses . . . conform to the purposes of the federal regulations*."

- The phrase "*the records are no longer stored by BLM"* inappropriately implies that BLM does not retain records of the conveyance.

Under "*Relocating a...."* on **page 5.6**, a relocation cannot be implemented simply by a memorandum of understanding.

The first sentence in the second paragraph of "*Vacating or Terminating…*" on **page 5.6** incorrectly states that the December 18, 2001 termination date "*is identified in the law."* This date is in regulation, not in statute. This is an important distinction. The remainder of the paragraph refers to BLM "*policy,*" but most policy is also in regulation. A citation for the regulations would be helpful.

Under "*What to Do if . . . Blocked,*" (**page 5.6)** two significant errors need correction:

- The state does not manage 17(b) easements. In fact, most easements which access state land/waters are managed by BLM.

- Persons concerned over a blocked 17(b) easement should contact BLM, not the state.

Chapter 5 Page Specific Comments

Page 5.1, line 13, add "*or effectively isolated*" after "*surrounded*"

Pages 5.1-5.7, throughout this chapter change "*17b*" to "*17(b)*"

Page 5.1, line 21, replace "*in the*" with "*by*"

Page 5.1, line 31, delete "*are*" before "*qualify*"

Page 5.3, line 15, delete "*for*"

Page 5.3, line 21, change "*1:63,000*" to "*1:63,360*"

Page 5.3, line 37, delete "*s*" in "*line*"

Page 5.4, and line 1 on page 5.5, delete the apostrophe in "*MTP's*"

Page 5.4, lines 6-7 delete the duplicate "*from the*"

Page 5.6, line 5, change "*an*" to "*a*"

Chapter 6. OPTIONS FOR IMPROVING LEGAL ACCESS TO ALASKA'S RECREATION TRAILS

✓ As noted in our introduction, it is inappropriate for a technical Handbook to be used as a "*soap-box.*" This chapter, if provided at all, should be rewritten to focus on a range of possible recommendations, such as specific technical tools and changes in laws or regulations that could be considered. A broad range of legal, administrative, and technical options to address the many facets of perceived problems would indeed be useful.

We also recommend that the discussion of the pre-statehood Alaska Roads Commission and other jurisdictions that were involved in transportation be moved to the introduction of the entire Handbook. An overview of a historical perspective of management entities incorporated into a history of land law evolution in Alaska would provide a good basis for understanding important easement-related concepts such as "unreserved public land." If the Alaska Roads Commission remains in this section as part of explaining one proposed option for current trail issues, then a more thorough explanation of its responsibilities and legal authorities would be necessary.

✓ Without a comprehensive review of each agency's actual programs, the document unnecessarily criticizes agencies for not establishing trails. The following biased statement (**page 6.1**) illustrates this point: "*the burden of establishing legal public access for trails has been given low priority by public agencies, or shifted to trail advocates.*" State agencies, which have several programs directly related to establishing and maintaining legal access, do not regard these responsibilities as a "*burden.*" State agencies have not in any way been involved in *"shifting"* these responsibilities to the public. Departments have certainly had to absorb funding cuts that have necessitated program cutbacks, but they have not abrogated their basic responsibilities.

From another perspective, comments about public authorities being willing to assume the management responsibility for trails may be partially true, but it is not always feasible. No one can force creation of a new public trail across a privately owned land parcel. It is no easy task to negotiate with private landowners to obtain part of "their" land for public use. The Handbook oversimplifies a task that is very time consuming and sometimes impossible. It takes much more than forming "*trail authorities*" to get it all accomplished.

✓ The Handbook proposes a type of "*trail authority*" to "*establish, improve and maintain the trails.*" There are a number of logistical problems with this option, which should be explained, such as the legal distinctions between establishing a trail across multiple jurisdictions and maintaining it. It might be more useful for the Handbook to identify mechanisms that facilitate coordination and joint establishment and maintenance of trails within existing federal and state programs. Funding for expanded oversight and bureaucracy may mean diverting money and existing personnel from actual trail protection work.

✓ We suggest a recommendation to review each agency's mandates to assure that they are meeting their present responsibilities for access consistent with existing law and to recommend necessary policy or priority reevaluations. The Handbook could encourage dialogue to resolve differences in legal interpretations so that proactive trail initiatives are more effective.

The discussion of money on **pages 6.2-6.3** fails to recognize monies spent by existing agency programs. Since CARA did not pass, we recommend the discussion be written more generically instead of relying heavily upon future legislation and interpretations of one statute's implementation.

The first two paragraphs on **page 6.4** continue to editorialize without any real understanding of the numerous issues. They should be deleted. Focusing on past "*failure of government*" does not engender the necessary collaboration to fix problems. Providing recommendations for the future would be far more positive.

✓ The discussion on "*Need to End the Stalemate Between Federal and State Government*" (**page 6.4**) needs to be rewritten.

- One reason RS 2477s are controversial is because the federal government refuses to acknowledge the established legal authority on their validity. Also, as noted throughout the Handbook, private landowners often oppose trails across their land, regardless of the trails' origins. With the imminent settlement in Fairbanks in the Harrison Creek RS 2477 case, the Handbook could point out that BLM is not only recognizing these rights-of-way but is assisting in the surveys. Expansion of this type of cooperation could go a long way toward resolving disputes over where they exist and having them legally recorded.

- Numerous key disputes between the federal and state governments are omitted. For example, ANILCA Section 1110(a) provides for access on federal public lands for traditional activities, which includes recreation. ANILCA access provisions rely upon documentation of activities that occurred prior to passage of ANILCA. The state has consistently sought cooperative studies to document what access was used where and for what purpose prior to ANILCA. Such a cooperative study has been completed for the Wrangell-St. Elias park unit. Without such studies in other CSUs, it will become more difficult, over time, to identify the statutorily protected access.

The Handbook would be more useful if the entire discussion of federal and state "stalemates" fleshed out the legal interpretations and management disputes, then provided a range of recommendations or options for resolution.

The discussion (**page 6.4**) of a "*Need to Provide Improved Liability Coverage to Private Landowners"* downplays the liability protections for trails already in state law, although we agree that some finetuning would be useful. We suggest rephrasing the statement "*it is not adequate for current and future trail needs"* to "*it may not be adequate*." It would be helpful for the Handbook to articulate landowner concerns, how current statutes address these concerns, and what remaining issues need attention. Federal statutes affecting 17(b) easements would also be useful to address.

✓ It would be helpful if the Handbook could address management issues, such as hardening of trails, in a little more detail. For example, because of ongoing erosion problems with some 17(b) easements important for fishing access in specific areas of the state, ADF&G has researched

sources of hardening materials and other options for management of trails to reduce erosion (and subsequent widening of trails). One ongoing study is testing a type of trail material in wetlands. We would be happy to provide updated information on the results of the study and other sources of materials for inclusion in the Handbook.

The last paragraph on **Page 6.7** presents the idea of an annual trails license. Among the issues associated with this concept is the difficult question of who decides which trails are improved with the funds.

Chapter 6 Page Specific Comments

Page 6.2, line 25, delete "*s*" in "*trails*"

Page 6.3, lines 8-11, separate into two sentences

Page 6.5, lines 42-43 are unclear

APPENDIX A – DEFINITIONS

"ADL" – These numbers are more inclusive than listed

"classification" – State lands are classified through a public process as well.